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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 759

HARRY BRIDGES,

Petitioner,

vs.

STATE OF CALIFORNIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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HARRY BRIDGES,

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vs.

STATE OF CALIFORNIA.

PETITION FOR WRIT OF CERTIORARI.

To the Supreme Court of the United States:

Your petitioner Harry Bridges, respectfully alleges:

A.

Summary Statement of the Matter Involved.

The petitioner was adjudged guilty of contempt of court by the Superior Court of Los Angeles County, having been held liable by that court for the publication in the public press of the contents of a telegram to Frances Perkins, Secretary of Labor (R. 48-52). The telegram contained a vigorous and caustic criticism of a judgment of one of the judges of the Los Angeles Superior Court (R. 27).* The

* The text of the telegram, as well as the facts concerning its dispatch and publication, is set forth in the petitioner's brief in support of this petition (*infra*, p. 21-22).

petitioner was fined $125.00, and in the alternative, was given a jail sentence of five days in the Los Angeles County Jail. The judgment of conviction was affirmed by the court below, the Supreme Court of California.

The constitutional questions raised by this petition for a writ of certiorari are whether the petitioner has been deprived of freedom of speech, freedom of the press, the right to petition the government for a redress of grievances, and due process of law, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

B.

Reasons Relied On for the Allowance of the Writ.

At the bar of the courts of California, the petitioner urged that the judgment of conviction for contempt of court abridged his freedom of speech and freedom of the press by violating two standards applicable to free speech cases generally, and to contempt of court by publication, as well:

(1) the "actual obstruction" principle, first espoused by Justices Holmes and Brandeis, in dissent, in *Toledo Newspaper Co.* v. *U. S.*, 247 U. S. 402, 422; adopted by the Supreme Courts of South Dakota and Indiana (in *State* v. *American News*, 64 S. D. 385, and *Nixon* v. *State*, 207 Ind. 426, respectively) and accepted by Justice Gibson, dissenting in the court below;* and

(2) the "clear and present danger" rule, first delineated by Justice Holmes in *Schenck* v. *U. S.*, 249 U. S. 52; in effect

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* Justice Phil Gibson did not participate in the decision of the court below in the case at bar, having been appointed a member of that court subsequent thereto. He did, however, take part in the consideration of the petition for re-hearing and was one of the three justices voting in favor of granting the petition, the court dividing 3 to 4 upon that issue (R. 177). Justice Gibson expressed his views in the instant case, on the occasion of the decision of the court below in *Times-Mirror Publishing Co.* v. *Superior Court*, 99 Cal. Dec. 108. For the convenience of the Court, Justice Gibson's dissent is attached as an exhibit to this petition (Appendix, pp. 26-34). The opinion of the court appears in the record, pages 136-161.

abandoned by this Court in *Gitlow* v. *New York*, 268 U. S. 652, over the dissenting protests of Justices Holmes and Brandeis; re-asserted by Justice Brandeis in *Whitney* v. *California*, 274 U. S. 357; and, finally, readopted by this Court in *Herndon* v. *Lowrey*, 301 U. S. 242.

As applied to him, the petitioner contends that a standard of guilt upon a charge of contempt of court by publication, short of the "actual obstruction" principle, or the "clear and present danger" rule, denies due process; and that, particularly, both the "inherent tendency" view adopted by the trial court and the "reasonable tendency" test espoused by the Supreme Court of California, as applied to the petitioner upon the evidence adduced against him, fix such "vague and indeterminate boundaries" as to constitute a "dragnet which may inmesh anyone" exercising his constitutional right of freedom of speech, quite as much as did the "vague and indeterminate" standard announced by the Georgia courts, and rejected by this Court, in *Herndon* v. *Lowrey, supra.*

This petition brings to this tribunal for determination the principles of freedom of speech and of the press as applicable to the judiciary; and, particularly, these principles as applicable to constructive contempt by publication. In recent years, this Court in a series of decisions,* all marching along a broad main higl way and in the same direction—in the direction of the protection and extension of freedom of speech and freedom of the press—("the matrix, the indispensable condition of nearly every form of freedom"),** has stoutly upheld freedom of expression.

In these free speech cases, the issue was the constitutional limit to legislative and executive authority, when the legis-

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* *Herndon* v. *Lowrey*, 301 U. S. 242; *Lovell* v. *Griffin*, 303 U. S. 444; *Hague* v. *C. I. O.*, 307 U. S. 496; *Schneider* v. *Irvington*, November 22, 1939, 60 Sup. Ct. Rep. 146, 84 L. Ed. Adv. Op. 115

** Mr. Justice Cardozo in *Palko* v. *Connecticut*, 302 U. S. 219.

lature and executive came into conflict with the right of the individual to freedom of expression.

It is, however, many years since this Court has had under consideration the constitutional limit, if any, to the authority of the judiciary, when the courts of the nation come into conflict with the rights of the people to free speech and a free press. The last time this Court dealt with the problem of constructive contempt by publication upon the merits was twenty-three years ago.* It is thirty-five years now since this Court reviewed a judgment of contempt by a State court.**

Since the consideration by this Court, of the applicable principles of free speech to publications affecting the judiciary, the State courts have expressed views and adopted standards that are hopelessly conflicting and irreconcilable, as disclosed by the adoption of the "actual obstruction" principle by the South Dakota and Indiana courts, on the one hand, and the adherence to the "tendency" doctrine by the court below in the instant and *Times* cases, on the other.***

Such conflict calls for clarification and authoritative determination by this Court.

In the recent free speech cases, this Court has taken pains to fix the boundaries of free speech, when such speech concerns political issues, so that he who undertakes to exercise such constitutional right now knows with reasonable certainty when he is running afoul of the law, and when the Constitution of the United States may no longer afford him a shield.

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* 1917, *Toledo Newspaper Co.* v. *U. S.*, 247 U. S. 402; *Craig* v. *U. S.*, 263 U. S. 353, the latest decision was adjudicated on technical grounds, Justices Holmes and Brandeis dissenting.

** 1905, *Patterson* v. *Colorado*, 205 U. S. 463.

*** The Los Angeles *Times* publicly announced its intention to petition this Court for a Writ of Certiorari on the ground that its freedom of the press was abridged by the decision of the court below (L. A. *Times*, February 4, 1940).

Until, and unless, there is similar clarification by this Court upon the subject of contempt by publication, one who dares assert his constitutional right of freedom of expression upon an issue pending in the State courts, runs the risk of being "immeshed" by the "dragnet" of the "vague and indefinite boundaries" to such speech set up by the California courts.*

This petition raises important questions of Federal constitutional law, involving freedom of speech and of the press—rights which this Court has deemed "fundamental personal rights and liberties." **

The petitioner contends that if such characterization of those rights is not to be "an empty phrase", as affecting his freedom of speech, this Court should review the judgment of conviction of the petitioner for an alleged contempt of the Superior Court of Los Angeles County, which judgment of conviction the petitioner claims abridges his constitutional right to freedom of speech and of the press.

WHEREFORE, your petitioner respectfully prays that this Court issue a writ of certiorari to review the judgment of the Supreme Court of the State of California affirming your petitioner's conviction for contempt, as aforesaid.

HARRY BRIDGES,
Petitioner.

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* From Justice Roberts in the *Herndon* case.
** *Schneider* v. *Irvington, supra.*

SUPREME COURT OF THE UNITED STATES

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No. 759

HARRY BRIDGES,

Petitioner,

vs.

STATE OF CALIFORNIA.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Supreme Court of California is reported in 98 Cal. Dec. 341, 94 Pac. (2d) 983.

II.

Jurisdiction.

1. Statutory Provisions Sustaining Jurisdiction.

Jurisdiction of this Court is invoked under Judicial Code, Sec. 237 b, as amended by Act of February 13, 1925, 43 Statutes 937.

2. Finality of Judgment.

The judgment forming the basis of the petition is final

both in form and substance and disposes of all the elements of the controversy in the court below.

3. Petition Timely Filed.

The final judgment of the Supreme Court of California was entered on November 24, 1939. Prior thereto the petitioner had timely filed a petition for re-hearing with the court below, which petition the court considered, and on November 13, 1939, denied; the order of the Supreme Court of California, affirming the judgment of the California trial court, adjudging the petitioner guilty of contempt of court by publication, was made October 16, 1939 (R. 177).

On February 9, 1940, Justice Stanley Reed, upon a Motion for Extension of Time Within Which to File a Petition for Writ of Certiorari, entered an order extending said time to February 24, 1940.

4. Judgment of the Highest Court.

The Supreme Court of the State of California is the highest California court.

5. Cases Sustaining Jurisdiction.

The following cases, among others, sustain the jurisdiction:

Schneider v. *Irvington*, U. S. Supreme Court, October Term, 1939, Nos. 11, 13, 18 and 29, decided November 22, 1939; 60 Sup. Ct. Rep. 146, 84 L. Ed. Adv. Op. 115; and cases cited therein.

III.

Statement of the Case.

A summary statement of the case has been given under heading "A" in the Petition for Writ of Certiorari, and is not repeated at this point. A fuller statement is set forth later (*infra*, p. 1-2).

IV.

Specification of Errors.

The petitioner assigns the following errors in the record and proceedings below:

The Supreme Court of California erred in its decision and judgment, in the following particulars:

(1) In ruling that the judgment of conviction of the petitioner for contempt of court by publication does not deprive the petitioner of due process of law under the Fourteenth Amendment to the Constitution of the United States, by impairing the petitioner's right to freedom of speech and freedom of the press, as guaranteed by said due process clause; and particularly,

(a) in rejecting the "actual obstruction" principle

(b) in refusing to apply the "clear and present danger" rule, and

(c) in applying the "tendency" test; such latter test being "too vague and indefinite" to constitute an adequate standard of guilt.

(2) In ruling that the judgment of contempt does not deprive petitioner of due process of law, by denying to the petitioner the right to petition the government for a redress of grievances.

(3) In ruling that the contempt conviction does not deny the petitioner due process, by abridging his constitutional right to engage in a lawful occupation, to-wit: that of a labor union official.

(4) In ruling that the contempt judgment is supported by evidence sufficient to sustain a conviction. Such a ruling deprives the petitioner of liberty and property without due process of law.

V.

Summary of Argument.

Point 1.

The "inherent tendency" and "reasonable tendency" tests, applied by the California courts to publication pertaining to issues pending in the courts, are too vague and indefinite; as such they offend due process of law and deprive the petitioner of freedom of speech and freedom of the press, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

The "actual obstruction" principle, and "clear and present danger" rule applied to publications alleged to be in contempt of court.

Point 2.

The petitioner was deprived of due process of law and freedom of speech and of the press, in that the judgment of conviction of contempt of court denied the petitioner the right to petition the government for a redress of grievances.

Point 3.

The petitioner was denied due process in that his right to follow a lawful occupation, to-wit: that of a labor union official, was unduly impaired by the contempt judgment.

Point 4.

There is no evidence to support the conviction of contempt. A contempt judgment, based upon a publication, in the absence of supporting evidence, denies Federal due process.

VI.

ARGUMENT.

Point 1.

The "inherent tendency" and "reasonable tendency" tests, applied by the California courts to publication pertaining to issues pending in the courts, are too vague and indefinite; as such they offend due process of law and deprive the petitioner of freedom of speech and freedom of the press, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

The "actual obstruction" principle, and "clear and present danger" rule applied to publications alleged to be in contempt of court.

The trial court adopted the "inherent tendency" rule and, applying it to the evidence, found the petitioner guilty of contempt (R. 156-159).

The Supreme Court of California, although asserting that it was rejecting that rule, in effect, adopted it. It merely changed its name to "reasonable tendency" test.

The Supreme Court of California expressly rejected two tests urged upon it by petitioner to be required by the constitutional guarantees of freedom of expression; namely, the "actual obstruction" principle and the "clear and present danger" rule.*

The classic criticism of the "tendency" doctrine, as a test of the legality and constitutionality of utterances in general, is contained in Jefferson's Virginia Statute on Religious Liberty:

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*The court below erroneously, and, we believe, inadvertently stated that the petitioner was relying upon the "inherent and dangerous tendency" rule (R. 158). This is incorrect. The petitioner urged *against* the adoption and application of such a rule on the ground that such a standard was too vague and indefinite and hence offends due process.

> "To suffer the civil magistrate to intrude his power into the field of opinion, or to restrain the profession or propagation of principles, on supposition of their ill *tendency*, is a dangerous fallacy, which at once destroys all liberty, because he, being, of course, judge of that tendency, will make his opinions the rule of judgment and approve or condemn the sentiments of others only as they shall square with or differ from his own."* (Italics ours.)

This point of view is substantially adopted by this Court in *Herndon* v. *Lowrey*, *supra*, in which the "dangerous tendency" view was rejected as "too vague and indefinite" a test, since such standard permitted punishment of the "fair use of the opportunity for expression of political opinion." A yardstick shorter than the "clear and present danger" rule, this Court ruled, "licenses the jury to create its own standard of guilt in each case," leaves the whole case to the pure "speculation" of a jury, and "permits the punishment of all utterances when unjust and unreasonable in the estimation of a court and jury." Such "vague and indeterminate boundaries," this Court held to constitute a "dragnet which may immesh anyone" who dared to exercise his constitutional right of freedom of speech.

The "tendency" doctrine is effectively refuted by Justice Gibson in the court below, dissenting in the *Times* cases referred to in the petition (Appendix, pp. 26-34):

> "The test adopted by the majority opinion is the *tendency* of the publication to influence the proceeding. Under this test the inquiry is not as to what happened, but as to what might have happened. It is the supposed *tendency* of the publication to affect and not its *actual effect* which is involved. It is not the trial judge himself, but an hypothetical judge with whom the test is concerned. Denial by the accused of any intention to influence is futile, since the *tendency alone* is con-

* Quoted by this Court, in *Reynolds* v. *U. S.*, 98 U. S. 145, 163.

sidered. Denial by the judge that he was in fact influenced is likewise no defense, and indeed is not even relevant. It is not material to inquire whether the publication was seen or read by the judge or jury, since this would throw light only upon its actual effect (italics ours).

"This test is so vague and elastic, varying with the viewpoint of the individual judge who cites the offender, that it necessarily places an unreasonable restraint upon free speech and press. In the first place, the establishment of so loose a rule provides a temptation for the judge to invoke the power over contempt as a means of prohibiting political or personal attacks upon him or his views. We are all well aware of the constantly broadening scope of the judiciary as an interpreter of constitutional and statutory policies in the field of government, and there is grave danger in permitting a court to ward off criticisms directed at its policies, under the guise of protecting a particular court proceeding from improper influences. * * *

"In the second place the test permits the placing of restraints on speech and press as varied as the sensitivities of a particular judge."

Justice Gibson urged the adoption of the "actual obstruction" principles, quoting with approval from, and following, *State* v. *American News Co., supra.*

The views expressed by Justice Gibson are substantially those of Justices Holmes and Brandeis in their dissent in the *Toledo* case, in which those justices urged a reversal of a judgment of contempt on the ground that "there was no emergency" and "there was nothing to warrant a finding that the administration of justice was obstructed."

Nixon v. *State*, 207 Ind. 426, is in accord.

(a) *The application of the "actual obstruction" principle to petitioner.*

There is no claim in the contempt charges against the petitioner, no evidence admitted in the course of the trial,

nor any finding by the trial court or the court below, of an "actual obstruction", or actual interference with the administration of justice. Both the trial court and the Supreme Court of California ruled that no such showing was necessary (R. 158-159).

The adoption and application by this Court of the "actual obstruction" principle would require a reversal of the judgment of conviction.

(b) *The "clear and present danger" rule, applied to publication alleged to be in contempt of court; and applied to the petitioner.*

First entering the mansions of the law in 1917*, the "clear and present danger" rule, became the law of the land in 1937.** Its classic and most comprehensive expression is by Justice Brandeis in his (and Justice Holmes') concurring opinion in *Whitney* v. *California*, 274 U. S. 357, Justice Brandeis declaring:

> "That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled."

The court below, however, expressly rejected this test as applicable to alleged contempt by publication and refused to apply the rule to petitioner (R. 156-159).

That the state (the government) has both the right and the duty to protect itself from destruction is beyond doubt. Yet the state, it is now determined by this Court, may not penalize utterances and publications "tending" to destroy the government; that the courts have the authority and the

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* *Schenck* v. *U. S., supra.*

** *Herndon* v. *Lowrey, supra.*

obligation to safeguard themselves from obstructions, interferences and outside influences concerning pending cases, is equally settled; a fortiorari, the courts say not, without invading constitutional guarantees of freedom of speech and of the press, punish publications merely "tending" to obstruct, or tending improperly to influence, the courts.

Interferences with the judiciary admittedly constitute "substantive evils", which the courts may constitutionally penalize.

In dealing with evils the Congress of the United States and the legislatures of the states may penalize the expression of opinions, only when "there is a clear and present danger that they will bring about substantive evils."*

We are unable to apprehend any distinction, either in fact or in law, which would make the judiciary immune from these constitutional limitations, and authorize the courts to take steps in self-protection against interferences and embarrassments which the legislatures may not take to protect the state and federal governments from threatened destruction by force and violence.

In our opinion, the constitutional limitations upon legislative and executive authority apply with equal, if not greater, force against judicial exercise of the contempt power when that authority is asserted against mere utterance and publication.

The legislation considered by this Court in the cases in which the "clear and present danger" rule was evolved and formulated were all intended to protect the government: state criminal syndicalism acts, criminal anarchy laws, and sedition laws to preserve the state governments from destruction by force and violence; the federal Espionage Act, enacted by Congress to protect the federal government and its agencies from interference during the

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* *Schenck* v. *U. S., supra.*

great emergency of the World War. The judiciary constitutes one branch of our government; no matter how admittedly important or indispensable a part of that government, the courts have no greater power to protect themselves from interferences than the whole government has to preserve itself from destruction. The part can have no greater authority of self-protection than does the whole.

If this Court adopts and applies the "clear and present danger" rule to alleged contempts by publication, we suggest the following elements as essential to sustain a judgment of conviction for contempt:

(a) The publication must have come to the attention of the judge before whom the cause is pending.

(b) There must be evidence of, and a finding of, an express intent to influence the judge. Publication, *per se*, of an opinion concerning a pending case, addressed to the general public, constitutes an *exercise* of the right to freedom of the press; communication to the judge (whether successful or unsuccessful) constitutes the *abuse*, which may be penalized.

> "* * * Legislative intervention can find constitutional justification only by dealing with the *abuse*. The *rights* themselves must not be curtailed." *DeJonge* v. *Ore.*, 299 U. S. 353. (Italics ours.)

Judicial intervention should be measured by the same standard as legislative intervention.

> "We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country," (Justice Holmes, dissenting, in *Abrams* v. *U. S.*, 250 U. S. 616, 624)

should apply to the judges, as well as to the legislators.

(c) The contents of the publication must be such as would influence a judge of ordinary firmness and fortitude.

Applied to the instant case, the "clear and present danger" rule would require annulling the judgment of conviction and a ruling that the judgment abridges free speech, for the reasons that:

(a) There is no evidence in the record in the instant case that the publication of the telegram came to the attention of the court before whom the cause was alleged to be pending.

(b) The evidence not only discloses *no* express intent to influence any judge of the Superior Court of California but is, on the contrary, affirmatively to the effect that the petitioner had no such intent. The trial court upon the conclusion of the hearing expressly stated:

> "I do not think it (the telegram) was sent with the specific intent of influencing Judge Schmidt in his decision." (R. 47).

(c) The contents of the telegram, although a vigorous and forthright protest against Judge Schmidt's decision, would not influence a judge or ordinary firmness and fortitude.

Freedom of speech includes [redacted] right to criticize.

> "* * * If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought that we hate." (Justice Holmes, dissenting, in *U. S.* v. *Schwimmer,* 279 U. S. 644, 653.)

Point 2.

The petitioner was deprived of due process of law and freedom of speech and of the press, in that the conviction of contempt of court denied the petitioner the right to petition the government for a redress of grievances.

The right to send a telegram to the Secretary of Labor protesting against the decision of a local judge and the right to give publicity to such a telegram, is merely a manifestation of the right to petition the government for a redress of grievances.

This right is one of the oldest and one of the most universally accepted, of the common law political rights of Englishmen and Americans. It is specially incorporated in and guaranteed by the First Amendment.

2 Story, *Commentaries on the Constitution* (5th edition), Sections 1894-1895;

1 Cooley, *Constitutional Limitations* (8th edition), pages 728, 729.

There should be no doubt that it is guaranteed and protected by the Fourteenth Amendment. Certain it is that there is a widespread, and justified, belief that "neither liberty nor justice would exist if" it "were sacrificed".*

The petitioner, as a representative of the longshoremen's union manifestly believed that the union was aggrieved by the decision of the Los Angeles Superior Court; in communicating such grievance to the appropriate Federal governmental agency, to whom the Congress has delegated authority to seek to substitute industrial peace for threatened industrial disturbance, the petitioner was exercising the modern right of petitioning the government for a redress of grievances.

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* Justice Cardozo in *Palko* v. *Connecticut, supra.*

Such right to petition necessarily includes the right to do so *publicily*.

In its very essence, a petition to the government is a *public, not a private*, matter. It is necessarily a matter of public record. Suppression or concealment of petitions to the government would be contrary to the fundamental democratic principle upon which this very right is based. Going a step further, this prerogative is a basic element of a democratic form of government; such a form of government requires the conduct of *public* affairs *publicly*. Therefore to deny, that the right to *publish* a petition is inherent in and corrollary to the right to petition, is effectually to deny and nullify the right itself.

That there are limits to the exercise of this right, as to all rights, constitutional or otherwise, is not denied. In the absence of a showing of an express intent to influence or embarrass proceedings in a State court, however, punishment for the public exercise of the right to petition abridges that right, in definance of constitutional guarantees.

Point 3.

The petitioner was denied due process in that his right to follow a lawful occupation, to-wit: that of a labor union official, was unduly impaired by the contempt judgment.

The right of the petitioner to carry on his occupation as a labor union official is protected by the Fourteenth Amendment.

Meyer v. *Nebraska*, 262 U. S. 390, 399;
Truax v. *Raich*, 239 U. S. 33, 41.

The sending of a telegram by a union official to the United States Department of Labor protesting a decision of a State court and pointing out that its enforcement will result in a serious interference with interstate commerce is a reason-

able and necessary part of a union official's occupation protected as aforesaid.

If collective bargaining, and legitimate labor unions as the instruments for the effectuation of collective bargaining, are to continue to have the effective sanction of the law, labor union officers must be permitted and encouraged to function, not in a vacuum or in secrecy, but in the open and publicly. They should be protected in, and not penalized for, the exercise of their legitimate duties. If democracy in trade unionism is to be favored by the law, labor union officers should be encouraged to expose their every act, both to their constituents and to the general public through the instrumentality of the public press which reaches both.

The litigation in the *Walker* case was of great public interest. The possibility of a Pacific Coast waterfront tie-up resulting from Judge Schmidt's decision was of grave public concern. The public was entitled to know every legitimate step taken by the petitioner in behalf of the union and its thousands of members to avert the danger of such a tie-up; the petitioner in dispatching the telegram complained of to the Secretary of Labor and in publicizing its contents in the public press, if it is determined that he is responsible for such publication, was merely fulfilling his duty, both to his constituents and to the public.

To say that a person may engage in an occupation and at the same time make it criminal for him to perform the acts required thereby, is in effect to completely nullify the constitutional right to engage in that occupation at all.

A judgment which penalized the petitioner for a legitimate act in the exercise of his lawful occupation offends due process.

Point 4.

There is no evidence to support the conviction of contempt. A contempt judgment, based upon a publication, in the absence of supporting evidence, denies Federal due process.

This Court will review the evidence when a Federal right has been specially set up, and claimed in a State court.

Norris v. *Alabama*, 294 U. S. 587;
Pierre v. *Louisiana*, 306 U. S. 354.

The evidence which constitutes the basis of the petitioner's conviction is substantially as follows:

For some time prior to the dispatch of the telegram complained of, on March 24, 1938, there had been litigation in the Superior Court of Los Angeles County, entitled "*Walker* v. *I. L. A.*", No. 420356. One of the issues in that suit was the possession of the hiring hall maintained for the longshoremen of the San Pedro port, California. On March 21, 1939, after a trial upon the merits, the Superior Court, Judge Reuben Schmidt presiding, made and filed a permanent judgment and injunction by the terms of which a receiver was appointed to take possession of and to administer the hiring hall.

The telegram read as follows:

> "This decision is outrageous considering I. L. A. has 15 members (in San Pedro) and the International Longshoremen-Warehousemen's Union has 3000. International Longshoremen-Warehousemen Union has petitioned the Labor Board for certification to represent San Pedro longshoremen with International Longshoremen Association denied representation because it represents only 15 men. Board hearing held: decision now pending. Attempted enforcement of *Schmidt* decision will tie up port of Los Angeles and involve entire Pacific Coast. International Long-

> shoremen-Warehousemen Union, representing over 11,000 of the 12,000 longshoremen of the Pacific Coast, does not intend to allow State courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board."

The petitioner, under oath, at the trial disavowed any intention to influence the court. The trial judge, in his judgment at the time of imposition of sentence, found that the telegram was not sent by the petitioner "with the specific intent of influencing Judge Schmidt in his decision" (R. 47).

Nor was there any evidence that the petitioner knew that, after the entry of judgment, the proceedings were still technically pending. On the contrary, he testified that he believed that with the entry of judgment the proceedings had terminated; and, further, that he had no knowledge of the pendency of motions for a new trial and to vacate the judgment (R. 116, 122-123). This testimony was uncontradicted. The motions were filed March 24, 1939. On January 22 an order was made by the trial judge staying proceedings in connection with the receivership order.

The uncontradicted evidence is that the petitioner dictated the telegram to his secretary; he did not, himself, release the contents to the press, nor did he instruct any person so to do (R. 114).

No instructions were given by the petitioner to his secretary, except that it be sent (R. 114). At the same time he dictated substantially the same telegram to the Chairman of the National Maritime Commission and the National Labor Relations Board (R. 109-110).

The petitioner testified that he had been requested, as an officers of a labor union, by the Department of Labor and other Federal agencies concerned with industrial peace, to advise such agencies of situations that endangered industrial peace (R. 110-112).

He further testified that the sole purpose for sending the telegrams to these governmental departments was to comply with such request and to advise these governmental agencies of a situation which, in his opinion, required the assistance of these Federal departments.

Pursuant to office routine, a copy of the telegram reached the desk of James D. O'Neil, the Public Relations Director of the C. I. O., who determined in his own judgment that the contents of the telegram were newsworthy, and who released the contents to the press (R. 102-103). This release was in accordance with the authority of Mr. O'Neil, as Public Relations Director, to determine what items were newsworthy (R. 100, 103-104, 115-116).

The release to the press was made by Mr. O'Neil without any instructions or communication from the petitioner (R. 104); nor did the petitioner have any conversation with Mr. O'Neil concerning the telegram or its release to the press (R. 103-104, 114).

There was no showing that either the dispatch of the telegram to the Secretary of Labor, or its publication in the public press, actually influenced Judge Schmidt, or any judge of the Los Angeles Superior Court, or had any actual effect upon the administration of justice in Los Angeles County.

Upon this evidence the trial court found

> (1) "That at or about the time of the sending of said telegram, the defendant, Harry R. Bridges, caused a copy thereto (thereof) to be given to one, James D. O'Neil, for the purpose and with the intent that the contents of the said telegram should, and would be furnished to and published in the newspapers on the Pacific Coast and elsewhere;" and
>
> (2) "That the statements contained in said telegram, and the publication of the fact of the sending of said telegram, and the publication of the contents thereof, all as aforesaid, were in and of themselves

calculated, and had, an inherent tendency to interfere with the orderly and due administration of justice in said action No. 420356, and to interfere with, influence, sway, and control the proceedings in said action, and to embarrass and influence the judge before whom said action was pending" (R. 51-52, 139).

A contempt proceeding is essentially criminal and penal in nature.

Gompers v. *U. S.*, 233 U. S. 604, 610;
Michaelson v. *U. S.*, 261 U. S. 42.

The sentence imposed upon the petitioner by the trial court was penal. He was fined and given a jail sentence, in the alternative.

The evidence against the petitioner discloses a failure of proof of personal participation in the *publication* of the telegram complained of.

A judgment of conviction of contempt in the absence of such participation in the offense denies due process.

Hoover v. *Wise*, 91 U. S. 308.

VII

Conclusion.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX.

L. A. 16928. In Bank. January 31, 1940.

THE TIMES-MIRROR COMPANY (a Corporation) and L. D. HOTCHKISS, *Petitioners*,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES, *Respondent*.

L. A. No. 16929. In Bank. January 31, 1940.

THE TIMES-MIRROR COMPANY (a Corporation) and L. D. HOTCHKISS, *Petitioners*,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES, *Respondent*.

Dissenting Opinion of Edmonds, J.

In the case of *Bridges* v. *The Superior Court*, 98 Cal. Dec. 341, I stated at length the reasons for my opinion that section 1209 of the Code of Civil Procedure is constitutional and should be upheld. This statute, which was adopted almost fifty years ago and within a few months after a newspaper editor had been found guilty of contempt of court, declares the public policy of the people of this state in regard to publications relating to a judge which are not made in the immediate presence of a court while in session and in such manner as to actually interfere with judicial proceedings.

Whether persons should be allowed to write or speak about a court or judge under the conditions mentioned in the statute, without being subject to prosecution for contempt of court in summary proceedings, is a question upon which there will always be great difference of opinion. But it is not the province of a court to determine the policy which is most conducive to human welfare and governmental stability. That is the legislative function, and the judicial department may only determine whether the determination of the legislature violates a constitutional guarantee.

In my judgment, the opinions of this court in former cases where the statute was in question were written with more concern for upholding the inherent power of courts than for the constitutional guarantees of free speech and a free press. Yet the experience of New York and Pennsylvania, where laws similar to that of California have been in effect for over one hundred years, show that neither the existence of nor respect for courts has been seriously challenged by taking from judicial officers the uncontrolled right to pass upon alleged constructive contempts of court. Judicial necessity based upon the claim of inherent power is neither reason nor authority for setting aside a statute which expresses the policy of the people of this state concerning acts which might otherwise be punishable as constructive contempts.

For these reasons I believe that each of the judgments should be reversed.

EDMONDS, J.

Dissenting Opinion of Gibson, J.

I dissent. The law as laid down in the Bridges case is controlling in this jurisdiction on the power of a court to punish summarily for constructive contempt. But, as I did not participate in the Bridges case, and the question is before me for the first time, it seems appropriate to express my views thereon. I disagree with the conclusion reached in the Bridges case and in the majority opinion herein, and I concur in the views of Justice Edmonds, dissenting in each case.

The rules laid down in these cases do not give adequate recognition to or protection for the constitutional right of free speech and press, but instead sacrifice that fundamental right for a need which is fancied rather than real. The integrity and independence of the court is not the only matter to be considered. There is the equally important and equally fundamental need of fearless comment on all activities affecting the public welfare, including the operations of the courts. To preserve one basic right at the expense of another is a doubtful gain. And, as very clearly appears from this and other proceedings, the two rights

frequently come into conflict. When this happens, each must give way in some degree in order that a proper balance may be maintained, and both preserved. A court is usually most concerned with the immediate problem of safeguarding itself from outside influences during a pending proceeding; but in invoking drastic measures toward that end, it may do irreparable damage to the other fundamental right.

The assumption that to permit legislative regulation of the asserted inherent power of a court to punish summarily for constructive contempt would ultimately lead to its destruction, is without foundation.

There is doubtless some justification for this fear where direct contempts, those which actually interrupt the court proceedings, are involved; but constructive contempts do not demand the same prompt and summary action. Their effect is indirect and not immediately felt; their punishment can likewise be delayed without injury to the court's prestige or procedure. If the courts should actually be subjected to intimidation or other improper influences by persons immune from any punishment or restraint under the statute law, then the court could doubtless assert its power as an arm of the government in its own behalf. But no such situation has arisen either here or elsewhere, and I doubt whether it ever could arise in normal times. However desirable it might seem from the viewpoint of the court to have this power, it is not in fact necessary to enable it to function and it is both safe and consistent with democratic principles to leave the matter within the control of the legislature.

The experience of those few states which have acquiesced in the legislative regulation of the court's power to punish for constructive contempt is ample proof of the fact that the courts function just as well and safely under such regulation as they do where they are entirely free from it. We have seen no signs and have heard no charges of disrespect or impaired efficiency with regard to the courts of Pennsylvania, Kentucky, New York or South Carolina, where the inherent power doctrine is not followed. In our own state an example of peculiar inconsistency is found in the rule on disqualification of judges. If, as the ma-

jority opinion holds, the inherent power of the courts makes them immune from legislative interference, no regulation which limits that power can be valid. But we have upheld legislation which permits the challenge of a judge for bias or other disqualification in proceedings for constructive contempt. (See, *Briggs* v. *Superior Court,* 211 Cal. 619.)

There is a growing belief among thoughtful students of this problem that the solution is to eliminate summary punishment and make the offense subject to the usual rules of criminal trial. The court's integrity may be protected in the same manner as other rights of person and property and other institutions of government are protected. This is indeed, as Justice Edmonds shows, the historically correct position; the venture into summary punishment has been demonstrated to be both bad history and bad law. Today the security of the state and all of its departments, officers, and branches, except the judiciary, is protected from improper influences only by the general statute law enforceable by trial of the offender in the courts before a jury. We would, I am sure, be amazed at the suggestion that any other officer or body of government, executive or legislative, be given this potent power; yet to the intelligent observer who is not a judge of a court, the spectacle of a judicial officer acting as prosecutor and judge, and meting out punishment besides, must seem equally amazing. The same observer might further reflect on the fact that matters having a purely hypothetical tendency to interfere with a judicial proceeding are conceived to require a more drastic system of suppression and punishment than overt acts of treason or rebellion striking at the very foundation of the government. In time we shall, I believe be brought to the conclusion that the normal course of trial is adequate and proper, and that either by a change in judicial viewpoint or by a constitutional amendment the legislative control will be recognized. (See, comments, 48 Yale L. J. 54; 7 Geo. Wash. L. Rev. 234, 241.)

But this point is for the present settled by the Bridges case, and must be accepted as the basis of decision in the instant case. Conceding the power, therefore, a problem of equal importance and perhaps greater difficulty arises in defining its scope. The test adopted by the majority

opinion is the tendency of the publication to influence the proceeding. Under this test the inquiry is not as to what happened, but as to what might have happened. It is the supposed tendency of the publication to affect and not its actual effect which is involved. It is not the trial judge himself, but an hypothetical judge with whom the test is concerned. Denial by the accused of any intention to influence is futile, since the tendency alone is considered. Denial by the judge that he was in fact influenced is likewise no defense, and indeed is not even relevant. It is not material to inquire whether the publication was seen or read by the judge or jury, since this would throw light only upon its actual effect.

This test is so vague and elastic, varying with the viewpoint of the individual judge who cites the offender, that it necessarily places an unreasonable restraint upon free speech and press. In the first place, the establishment of so loose a rule provides a temptation for the judge to invoke the power over contempt as a means of prohibiting political or personal attacks upon him or his views. We are all well aware of the constantly broadening scope of the judiciary as an interpreter of constitutional and statutory policies in the field of government, and there is grave danger in permitting a court to ward off criticisms directed at its policies, under the guise of protecting a particular court proceeding from improper influences. As Mr. Chief Justice Taft said, concurring in *Craig* v. *Hecht*, 263 U. S. 255, 279: "* * * the delicacy there is in the judge's deciding whether an attack upon his own judicial action is mere criticism or real obstruction, and the possibility that impulse may incline his view to personal vindication, are manifest".

In the second place the test permits the placing of restraints on speech and press as varied as the sensitivities of a particular judge. The present case furnishes us an excellent example of the confusion thus engendered. The Los Angeles Bar Association Committee, the trial judge and this court do not agree on the character of certain of the publications. The necessary result of such differences of opinion is to cause critics and commentators to limit or entirely forego their public function rather than to risk the

uncertainties of contempt charges by temperamental judges.

In sharp contrast is the view of a few courts and nearly all of the writers that the publication should not be considered contemptuous unless it actually interferes with the orderly administration of justice. Under this test no remote possibility or tendency toward obstruction is sufficient. Nor is the effect of the publication on a weak judge or a purely hypothetical judge the controlling factor. The judge is assumed to be possessed of a character commensurate with his position, and able to withstand the incidental effects of free public discussion of issues involved in a judicial proceeding. This attitude is well stated in Mr. Justice Holmes' dissenting opinion in *Toledo Newspaper Company* v. *United States*, 247 U. S. 402. And in the leading case of *State* v. *American News Company* (S. D.), 266 N. W. 827, 833, the court said: "We believe that any publication to be punishable as contempt, should be embarrassing or obstructive to the administration of justice in a pending case, and obstructive in fact rather than in theory or by possibility. * * * We think the courts should reserve the use of the weapon of contempt for such publications as can fairly and reasonably be said likely in point of actual fact to intimidate, influence, impede, embarrass, or obstruct the court in the due administration of justice in an actually pending matter. And we entertain the opinion that if error is made in either direction in determining that question, it is better and wiser to err in favor of absolute and unresricted freedom of speech rather than in the other direction."

It seems to me that if we are to accept the doctrine of summary punishment for constructive contempt, the extraordinary power thus created and applied in defiance of the legislative will should be used sparingly and cautiously. We should not ignore the growing suspicion that courts are prone to place their own security above all other considerations. We should recognize the importance, indeed, the vital necessity of the fullest comment and criticism in matters of public interest, and not seek to exempt the courts from such criticism. The course of reform in the judicial field itself depends in part upon a free and vigorous press which should not hesitate to condemn where it finds the actions of the court subject to condemnation, and the

editorial page cannot be confined to abstract academic discussion of non-controversial matters or of issues long dead. In short, we must look frankly at the realities; we must remember that many factors consciously or unconsciously influence judges, and that some are accepted as normal or unavoidable. We should apply the summary power, if at all, only to those publications which appear to ordinary persons intended and calculated to work an unmistakable and unjustifiable influence upon a particular case.

In reading over the editorials adjudged contemptuous in the present proceedings, it is difficult to perceive the manner in which they were found to constitute an improper interference with the administration of justice. Not one of them appeared until the verdict of the jury had been rendered after the conclusion of the trial. It was not proved that they were intended to exercise a prejudicial influence on the judge, nor that he saw or read them. The asserted contempt is derived entirely from the supposed tendency of the language used. We should expect, therefore, to find in them some formidable threat or intimidation, or at least some demands on the judge for specific action, coupled with suggestions of reprisal if the demands go unheeded. But these writings are not of this character.

The first editorial "Sit-Strikers Convicted" commends the conviction of certain persons as a victory for law and order and expresses pride in the functioning of local courts and juries. It refers to a radio address made by the district attorney and quotes a statement made by him congratulating the jury on one of the "most far reaching verdicts in the history of this country." There is certainly nothing in this editorial which should influence any judge in the performance of his duty.

The second editorial "The Fall of an Ex-Queen" is a brief and penetrating commentary on the political activities of Helen M. Werner. The subject of the editorial is used as an object lesson and the principal thought expressed therein is that political bosses rise and fall with changing times. I cannot find anything in this editorial which can be said to have even a remote tendency to obstruct the administration of justice or to influence or embarrass any judge.

The third editorial is entitled "Probation for Gorillas?"

It is a denunciation of certain defendants found guilty of deadly assaults in connection with a labor dispute. It abounds with such scathing terms as "wrecking crew," "sluggers for pay" and "thugs"; it urges that an example be made of them, and adds: "Judge A. A. Scott will make a serious mistake if he grants probation" to these men. Now this is strong language, and the statement just quoted was ill advised and unfortunate, but it does not necessarily follow that it was contemptuous. The publisher's affidavit calls attention to the familiar fact that in probation proceedings outside opinions and recommendations are invited. It is further pointed out that a former Presiding Judge of the Superior Court advised the Times that a criticism of a certain probation order published after it was granted, should have been made while the matter was pending. It appears that the Times has blundered in following the example of a district attorney, and in taking the suggestion of a Superior Court judge, with reference to the propriety of commenting on judicial proceedings.

Consider, however, the character of the case, and the circumstances surrounding it. This was no everyday affair, but one in which the public interest was aroused, and the events were widely discussed in the community. The views expressed by the Times were those held and freely expressed by many others. The attitude of the Times is made abundantly clear, and its bitter feeling toward certain labor leaders colors its opinions, but what of that? The Times is not on trial for its opinions; its readers will judge those for themselves. The Times is charged with obstructing justice and interfering with a pending judicial proceeding, and there is no evidence whatever of such obstruction or interference. The case had been tried, and verdict rendered; the jury was gone, and matters of sentence and probation were before the judge alone. In deciding these matters the judge has few, if any definite rules to guide him; he is influenced by countless experiences and observations, as well as by the total sum of impressions received from public and private comment on similar problems throughout his judicial life. In this group of impressions the present editorial, if actually seen and read, could hardly be said to occupy such a dominant place as to be obstructive or embarrassing.

And what if the judge was, in fact, aware of the views expressed in the third editorial; can it be said he was being informed for the first time of the position of the Times in cases of this character? Could there be any possible doubt in the mind of any informed resident of Los Angeles on the attitude of the Times in regard to the use of violence in labor disputes? The position maintained by the Times over many years on these matters is clearly established by the record. Its Los Angeles readers would find nothing unusual in the editorial: a judge who felt that it was obstructive or embarrassing would have to confess ignorance of one of the most familiar facts of the daily life of his community.

If the power over contempt is to be fairly and reasonably applied, two essential limitations on the test of constructive contempt must be recognized. First, it should be applied only to those publications of an unusual and abnormal character, those which to a layman are obviously improper and dangerous, because vindicative, threatening or inciting to violence. It should be inapplicable to comments of the usual, normal and expected type which the ordinary intelligent layman constantly meets with in the public press, the radio and informal discussion. Second, it should be applied only where it clearly appears that the publication was intended to reach the particular judge and was seen and read by him; and then only where it was of such a nature as to influence improperly a judge of ordinary firmness. We should assume that judges specially chosen for their important positions are capable of maintaining an impartiality and independence where others might weaken; we should realize that a judge of ordinary firmness should be a person of exceptional independence and integrity, immune from all but extraordinary influences.

Finally, in determining whether there is a tendency to obstruct justice, we should give due consideration to the stage of the case at which the publication occurs. When a period of relative finality is reached, as by the rendition of a jury's verdict, the dangers of outside influence have been reduced to a minimum, and comment thereafter should be freely permitted. At this stage, the newspapers must fulfill their proper function of criticism, and if they fail to comment when a matter is timely, they will be ignored

when their belated observations are eventually made. To say that a case is pending until its final adjudication is to state a legal platitude in place of a practical doctrine. If the case is beyond the reach of discussion even after a jury's verdict, and until the final conclusion of proceedings for probation, new trial and appeal, there can never be anything of value in public discussion of such matters. In truth, both from the point of view of the law and practice, no such theory is followed. There are but few cases which hold that comment after a jury's verdict and before sentence or judgment on appeal is contemptuous. (See 48 Yale L. J. 54, 61.)

Viewed in retrospect, these contempt charges were a regrettable mistake. No evidence of actual interference with any legal proceeding was produced. Nothing in the editorials was intended or calculated to thwart the rendition of impartial justice in the matters then before the court. No judge seems to have felt the pressure of improper influences. No disturbance of judicial calm occurred until after the accusations were filed.

All this is indicative of the lengths to which imagination may go in building groundless fears and in imputing potent and obstructive purposes foreign to the intent of the writer. I think that by our decision in this and the Bridges case we have sacrificed a substantial part of our cherished freedom of speech and press in order to stamp out an evil that does not exist.

The judgments should be reversed.

GIBSON, J.